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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

SKY CHEFS, INC.,
a Delaware corporation,

Petitioner,

v.

CONNIE DIAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented For Review

1. Whether a party's assertion that its opponent's use of peremptory challenges violates the principles of Batson v. Kentucky, 476 U.S. 79 (1986), is untimely if it is made only after the jury has been empaneled and sworn, the remaining venirepersons have been excused, the trial court has recessed and reconvened, Petitioner's motions in limine have been argued and ruled upon, Petitioner has noted several other objections and Respondent is prejudiced by the delay.

2. Whether a corporate party's objection "for the record" to its opponent's exercise of peremptory challenges adequately preserves such objection in a civil case where it does not ask the trial court to conduct a Batson type hearing.

3. Whether a corporate party in a petition for writ of certiorari may raise for the first time the argument that in objecting to its opponent's use of peremptory challenges it asserted the purported right of one of its employes to equal protection.

4. Whether a corporate party in a petition for writ of certiorari may raise for the first time the argument that an award of punitive damages against it violated its due process rights.

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STATEMENT OF THE CASE

Respondent, Connie Dias, was employed as a clerical worker in Petitioner's billing department in its Portland, Oregon facility beginning in April 1985. In September 1986 Mr. Tony Nathalia replaced Mr. Jim Durham as the general manager of that facility. Mr. Nathalia had been

transferred by the company from its San Diego facility, where he had also served as general manager.

Upon his arrival in Portland Mr. Nathalia engaged in ongoing sexual harassment of female employees. The harassment included daily comments on the breasts, buttocks and physical appearance of individual women; suggestions to women that they show him "a good time" and treat him as well as the women employees in the San Diego facility had treated him; staff meetings at which he established job standards for women employees that included the wearing of dresses or skirts, nylons and heels specifically so that he could admire women employees' legs.

From the evidence at trial the jury could have found that while Respondent was employed there Mr. Nathalia engaged in this conduct not only in front of his

female staff but also in front of their immediate male and female supervisors and managers at the Portland facility. There was also evidence that in 1986 Mr. Durham, who was transferred to another facility, also witnessed this conduct, as did Mr. Frederick Wagner, the company's business manager, on a visit from the company's home office. There was also evidence that Mr. Nathalia's supervisor, Mr. Jurgen Brinker, who was a vice-president of the company, knew of the harassment while Plaintiff was employed.

Respondent challenged Mr. Nathalia's dress code, objected to his treatment of other females in the office and complained about this treatment to her office manager, Mr. Tom Illk, and to other supervisors and managers at the Portland facility. After her meeting with Mr. Illk he spoke with Mr. Nathalia, who became

angry and guessed that Respondent was the instigator of the complaints by the women. Mr. Illk soon thereafter resigned after being harassed by Mr. Nathalia.

The sexual harassment continued despite Respondent's complaints. Although several male managers testified that they should have taken action to protect female staff from sexual harassment no such action was undertaken during Plaintiff's employment.

Mr. Nathalia retaliated against Plaintiff for making these complaints by berating and humiliating her at work, calling her "crazy" and "stupid spic"; isolating her from others; overscrutinizing and sabotaging her work; directing supervisors to discipline her for trivialities; interfering with her receipt of workers' compensation benefits following a June 1987 injury; and terminating her

employment on the first day back from her injury leave on December 7, 1987.

Mr. Nathalia was not terminated until 1988 and only after the company learned that another female employee had threatened to file a lawsuit.

On the first day of trial Petitioner objected "for the record" to the Respondent's exercise of her peremptory challenges, but only after the jury had been empaneled and sworn, the remaining venirepersons had been excused, the trial court had recessed and reconvened, Petitioner's motions in limine had been argued and ruled upon, and Petitioner had noted several other objections. At the time of the objection Petitioner did not request the Court to conduct a Batson type hearing. Nor did it explain that it was asserting anyone's right but its own relative to its objection.

The jury returned its verdict for Respondent in the sum of $125,000.00 in damages for emotional distress and $500,000.00 in punitive damages.

During the course of the trial there was evidence of the size of the company, its various offices, the number of employees in its Portland facility, and the amount of its customer billings out of the Portland facility.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner's Objection To The Jury Selection Process Was Untimely And Inadequate.

a. The objection was untimely.

As noted by the Court of Appeals, the Petitioner's objections to the use of peremptory challenges under the Court's holding in Batson v. Kentucky, 476 U.S. 79 was not timely made and Respondent was prejudiced by its tardiness. Dias v.

Sky Chefs, Inc., 919 F.2d 1370, 1380, n. 6 (9th Cir. 1990).

Petitioner asserts that "Petitioner timely objected to Respondent's peremptory challenges" and that "[D]espite Petitioner's objection, the district court made no inquiries of Dias, empaneled the jury and proceeded with the trial." Pet. at p. 5.

Contrary to this misleading assertion, the objection was not raised until after the jury had been empaneled and the remaining venirepersons excused. Dias v. Sky Chefs, Inc., 919 F.2d at 1380, n. 6; Tr. 57. By the time of the objection the jury had been sworn, the court had recessed and reconvened, Petitioner's motions in limine had been presented and ruled upon, and Defendant had noted several other objections. Id.; Tr. 41-57. The District Court could hardly have made

the inquiry before the jury was empaneled, as Petitioner now apparently argues would have been the logical way to proceed, because Petitioner did not make the objection until after the jury was empaneled and the remaining venirepersons excused.

b. The objection was inadequate.

Further, when it did make its tardy objection the objection itself was inadequate. Petitioner did not ask the Court to conduct a hearing on the issue of discriminatory intent. It merely stated its objection "for the record". Other courts have held such an objection to be insufficient to reserve the Batson argument. People v. Holder, 506 N.E. 2d 407, 408 (Ill. App. 3rd Dist. 1987), cert denied, 484 U.S. 1074 (1988); Sashner v. State, 500 So. 2d 1322 (Ala. Ct. App. 1986). Where, as in this case, the Batson argument is being asserted in a novel

application, more than an objection just "for the record" should be required to preserve the objection. Indeed, such an objection only signals the trial court to move on with the trial and that no further action on its part is requested.

Therefore, Respondent submits that Petitioner did not preserve the Batson issue for this Court's consideration.

2. Petitioner Raises For The First Time In Its Petition For A Writ Of Certiorari The Argument That It Seeks To Assert The Right Of Its Employee To Equal Protection.

Neither in the trial court nor in the Court of Appeals did Petitioner assert that it sought to represent the interests of its employee, Mr. Tony Nathalia. This argument is being raised for the first time before this Court.

In the District Court Petitioner did not raise the issue either during the trial or in its posttrial motions.

In the Court of Appeals it did not raise the issue in its briefs. In its opening brief it said that "Sky Chefs was sued for the alleged conduct of one of its male employees." App. Br. at 37. But Petitioner never argued that it was asserting the employee's rights rather its own. It later said it "was being sued for the action of one of its male employees, Nathalia, who wa [sic] alleged to have sexually harassed female employees in Sky Chefs' office. Thus, Dias had a strong motivation to improperly select jurors based upon gender." App. Reply Br. at 23. It therefore argued below that it had standing to assert the right in its own stead due to the nature of the issue involved. But it never argued that it was

asserting Nathalia's right. Its argument simply was that it could assert its right because of the fact that one of its male managers was being accused of sexual harassment.

Therefore, no court below was asked to consider this new argument.

3. Petitioner Has Raised The Punitive Damages - Due Process Issue For The First Time In Its Petition For Writ of Certiorari.

Again, this argument was presented neither to the trial court nor to the Court of Appeals. At trial Petitioner merely argued that the punitive damages award was not supported by the evidence. Def. Memo. In Supp. of Motion for J.N.O.V. and New Trial at 36. Again, in the Court of Appeals no constitutional argument was made in connection with the punitive damage issue. The award of punitive damages was only challenged on evidentiary

grounds. App. Brief at 29-31. The jury could reasonably have concluded from the evidence that the punitive damage award was an appropriate penalty and deterrent. Dias v. Sky Chefs, Inc., supra, at 1376.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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